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Juridical review of pastoral mediation in divorce cases of catholic married couples

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Abstract. The provision in Article 2 of Marriage Law involves the religious values of marriage sacredness to legalize marriage. However, no explicit involvement of religious law was found in the divorce settlement as has been regulated in Article 39 paragraph 1 of Marriage Law stating that divorce can only be granted in front of a court session after the court has tried and failed to reconcile the two parties. Mediation process requires a mediator other than the judge, as regulated in Article 19, paragraph (1) of Supreme Court Regulation No. 1 of 2016 on Mediation in Court Procedure. This paper focuses on Catholic married couple who filed a divorce application at District Court and involved pastor as the mediator for both parties. Pastors can be involved in divorce mediation of a Catholic married couple as regulated in Article 26 paragraph (1) of Supreme Court Regulation No 1 of 2016 concerning in-court Mediation Procedure that allow religious leader to serve as the mediator to reconcile a married couple who apply for a divorce. Therefore, the judge who presided over the divorce case can reject the divorce application filed by a Catholic married couple without pastoral consultation or mediation.

Keywords. Pastor, Mediation, Judge

1. Introduction

The validity of marriage is regulated in Article 2 of Marriage Law. Article 2 (paragraph 1) stipulates that marriage can be legally recognized when it is performed according to the religion of the two parties. Article 2 (paragraph 1) is the implementation of Article 28e (paragraph 1) of the 1945 Constitution, stipulating that every person shall be free to choose and to practice the religion of his/her choice. In this case, religious values are meant not only to be understood, but also appreciated and practiced in everyday life, including in marriage. Article 2 (paragraph 1) of Marriage Law underlies the implementation of marriage under religious laws adhered to by the two parties, and therefore a marriage can not be legally recognized when it is performed apart from the religious laws.

The Catholic Church believes that marriage is an agreement between a man and a woman to establish a lifetime, exclusive partnership (Budi 2019). This is in accordance with

Article 1055 (para 1) of Canon Law, stating that marriage in Catholicism is a covenant by which a man and a woman establish between themselves a partnership of the whole of life. As marriage constitutes a covenant, it involves marriage vows spoken by both parties to the marriage to love and honour each other in good time and bad time for the rest of their life. The marriage promises uttered by both parties to the marriage is confirmed by the sacrament of marriage. Sacraments are signs and means which express and strengthen the faith, render worship to God, and effect the sanctification of humanity and thus contribute in the greatest way to establish, strengthen, and manifest ecclesiastical communion (Lon 2019). The connection between the promises and the sacraments in marriage creates a religious nuance that establish an agreement between God and the bride and groom, where they will live together for the rest of their life to achieve the purpose of marriage.

Article 2 paragraph (2) of the Marriage Law stipulates that every marriage is recorded according to the applicable laws and regulations. According to Zainuddin Ali, as cited by Fatahullah et al, the recording of marriage serves two functions: formal and material (Fatahullah, Israfil 2020). In a formal sense, marriage recording is a complementary element of marriage administration that takes the form of marriage certificate issued by a marriage registrar. In a material sense, marriage recording serves as a proof of marriage. Marriage recording serves not only administrative function, but also as a valid evidence of a legal event and plays an important role in protecting the rights of the parties to the marriage.

The provisions in Article 2 (paragraph 2) of Marriage Law indicate that the government's role in the event of marriages is only limited to the registration of marriages and this means that the government only regulates the administrative aspects of marriages. However, in practice, the provisions in Article 2 paragraphs (1) and (2) apply cumulatively so that both must be applied as a condition for a valid marriage (Lestari 2017). Article 2 of the Marriage Law stipulates that marriage is legal if it is performed according to religious law and is registered, and this shows the involvement of religious law for the validation of marriage.

From the Article 1 of Marriage Law concerning the purpose of a happy and lasting marriage based on the belief in One and Only God we see that marriage is not simply a matter of civil union of a married couple, but also a religious union that is confirmed in Article 2 of Marriage Law, stating that a marriage is legal if it is performed according to the religion of the two parties. On the other hand, concerning the break-up of a marriage, Article 39 (paragraph 1) stipulates that divorce can only be granted in front of a court session after the court has tried and failed to reconcile the two parties. Article 39 indicates that no religious law was involved in the divorce process.

This paper is focusing especially on Catholic married couple who have decided to get divorced. For that purpose, they can file a divorce application to the District Court. With convincing reasons for divorce, the Catholic married couple can be granted a divorce decree under Marriage Law as the national law. No pastor was involved in the process of mediating the Catholic married couple who have decided to divorce.

2. Methods

The paper uses a normative legal research with statutory approaches, especially Marriage Law, Law Number 48 of 2009 concerning Judicial Power, Supreme Court Regulation Number 1 of 2016 concerning in-court Mediation Procedures that also serve as the primary legal source. In addition to primary legal sources, the present paper also uses secondary legal sources consisting of books and journals that are relevant to the topic under discussion. The

materials in this study are compiled using the deductive method by collecting and analyzing them systematically in order to obtain the results of the study from general ideas to specific conclusions.

3. Result and Discussion

The Authority and Power of District Judges in Divorce Proceedings

Article 1 (paragraph 3) of the 1945 Constitution expressly stated that the State of Indonesia shall be a state based on the rule of law. This means that the state of Indonesian put emphasis on the fulfillment of the public interest and at the same time realizing the welfare of the people. Pancasila as the foundational philosophy serves as the state ideology in an effort to achieve the objectives of national development, to protect all the people of Indonesia, to improve public welfare, to educate the life of the people, as stated in the preamble to the 1945 Constitution on paragraph IV.

The consequence of being a nation of laws is the authority to adjudicate and resolve conflicts between the litigants, where the parties ask the court to resolve the problem they are facing. The court has the authority to hear and decide on cases submitted by the conflicting parties. In general, courts have their respective authorities in receiving, examining and adjudicating and resolving a case. It is referred to as jurisdiction, which is the territory within which a court or government agency may properly exercise either its absolute or relative authority.

Absolute authority is a court's power to hear and decide on certain cases that no other judicial institutions have the authority over them. Relative authority is the power shared by similar judicial institutions in hearing and adjudicating cases on the basis of the territory or jurisdiction. The main task of courts is to hear, examine, and adjudicate every case filed to them. The District Court has jurisdiction in civil cases, namely all disputes regarding property rights or other civil rights, unless the law authorized other courts to examine and decide them. For example, examination and adjudication of divorce cases for Muslim couples fall within the jurisdiction of religious court, rather than the District Court. The latter accepts, examines, and adjudicates divorce cases for non-Muslim couples. The District Court is prohibited from refusing to examine, hear, and decide on a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it. Article 22 Aglemene Bepalingen, a judge who refuses to make a decision on a case, on the pretext that the law does not regulate it, there is darkness or incompleteness in the law, can be prosecuted for refusing to try the case. (Feriza 2016).

Article 24 (1) of the 1945 Constitution stipulates that the judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice. In a similar vein, Article 1 (1) of the Law No 8 of 2009 concerning Judicial Power stipulates that the judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice based on Pancasila and the 1945 Constitution for the administration of Indonesia as the state of laws.

Trial judges must act actively in the finding of facts that contribute to fair decision for the conflicting parties. Before making a decision, the judge must pay attention to matters relating to the case being examined. In Article 68A paragraph (1) of Law Number 49 of 2009 concerning the Second Amendment to Law Number 2 of 1986 concerning General Courts, it is stated that in examining and deciding cases, judges must be responsible for the decisions and decisions they make.

Indonesia is a state that implements a civil law system. This is in line with Zaka Firma Aditya and Rizkisyabana Yulistiyaputri who stated that Indonesia has adopted the civil law system and the main principle is to render the existing laws into positive ones in the form of written rules or constitution (Aditya 2019). Despite the fact that Indonesia adopted a civil law system, judges in this country are not to be simply the mouthpiece of the law, but also required to explore, to follow, and to understand the existing social values. This is in agreement with Article 5 (1) of Law No 48 of 2009 concerning the Judicial Power stating that Court and Constitutional Judges are obliged to explore, follow, and understand the public's collective legal values and sense of justice. Thus, their decisions are expected to be in accordance with the law and the public's sense of justice. Judges, as law enforcement officials, should be independent in deciding the cases they are handling. Law enforcement duty performed by judges has the aim of realizing justice, legal certainty and legal benefits in an effort to uphold the principles of humane justice (Arfiani 2022).

Judges may not suspend or refuse to make decisions on the grounds that the law is incomplete or unclear, in fact, in this case the judge must seek, explore and study the sources of the law. Judges must make legal efforts of law finding by, among other, reinterpreting the law (Nur 2004). For doing so, they must first find the legal sources. This means that judges make the effort of law finding for a certain legal event by, primarily, looking for the rules in the Law. When the rules can not be found in the Law, law reinterpretation can serve the purpose of law finding. The law finding in the trial process starts from constating events, qualifying events and then establishing and giving laws. All these are, principally, parts of the case that judges must handle through their decision. The existence of this judge's decision must have gone through the trial process, which began with reconciliation, reading the lawsuit, answering the lawsuit, replicating, duplicating, proving, drawing conclusions, deliberation of judges, and then finally making a decision.

Siti Malikhatun Badriyah, citing Sudikno Mertokusumo's opinion, said that law finding is the process of forming laws by judges or other legal officers who are given the task of implementing the law on concrete events. More precisely, she said that efforts for law finding include concretization, crystallization, and individualization of legal regulations or *das sollen* which are general in nature by considering concrete events or *das sein* (Badriyah 2011).

The task of the judge in the trial process is to do law finding by implementing the law on a concrete event. This means that law finding is made by judges in order to harmonize laws and regulations with the conditions of society. The law finding by the judges can be implemented by adapting laws that are considered outdated to societal changes and playing the role of law as a tool of social engineering.

The result of law finding can be a source of law to overcome the previously conflicting legal issues. Thus, judge efforts to find the law are not only concerned with applying laws and regulations that are abstract in nature to concrete events. Such efforts by the judge are intended to complement the positive law that has not been able to conform to the demands of social development. Therefore, a judge needs to be creative in carrying out his duties by relying on rational logic. This is intended to prevent judges, in carrying out their duties, from arbitrariness when making decisions so that no human rights violations occur. Ideally, the judge's decisions are intended, among other things, as a solution to legal issues faced by the parties and to achieve justice. They also need to comply with the provisions, both written and unwritten, as the basis for the decisions, contain aspects of stability, and provide equal opportunities for both parties.

Pastoral Role in Divorce Mediation of Catholic Married Couple

Article 1 letter (a) in Supreme Court Regulation No. 1 of 2016 on the Procedures of in-Court Mediation stated that mediation is a dispute resolution through the process of negotiation between the Parties facilitated by a Mediator. The mediator plays a significant role in helping to achieve peace between the two parties in conflict.

Mediators endeavor to bridge gaps between opposing parties. They help parties generate a mutually acceptable settlement of the immediate dispute. Both parties seek to generate settlement to the dispute without any coercion and pressure from any other party.

There is relevance between the regulation of the Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts and Article 32 of Government Regulation Number 9 of 1975, concerning the divorce trial. If this mediation process is reached, new divorce suit can no longer be filed for the reasons similar to those before the reconciliation is made. On the contrary, if the mediation process fails, the divorce lawsuit examination can be held in a closed session. Despite the fact that the mediation process can either be successful or failed, it must be carried out by the case examining judge. This has been regulated in Article 14 letter (l) of the Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts.

The decision of a court in and of itself constitutes law that has an impact on the Catholic married couple who file for divorce in the District Court.

Therefore, judges must be able to maintain balance in society in their efforts to explore and find laws that live in society to generate settlement of the legal disputes. Judges as decision makers in the divorce proceedings, in this case the Catholic married couple, are obliged to follow and understand the legal values of the Catholicism because the Marriage Law implements not only national legal values but also religious ones. Article 39 (paragraph 1) of Marriage Law states that divorce can only be granted in front of a court session after the court has tried and failed to reconcile the two parties. Efforts to maintain the integrity of the marriage can be implemented by mutual deliberation between husband and wife, as well as through the help of a third party to reconcile the disputing couple, and this is what is known as mediation (Lestari 2014).

The mediation process is based on Article 19 paragraph (1) of the Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts which determines that the parties have the right to choose one or more mediators registered on the mediator list in the court. The provision is also applicable in divorce cases involving a catholic married couple whose marriage is problematic. The divorce process can involve pastoral mediation to bring reconciliation, and therefore the church plays a part in preventing divorce. The involvement of a pastor aims to assist the conflicting parties in finding a way out of their marriage problems and in discouraging them from applying for a divorce.

It is undeniable that in living domestic life there are problems and as a test it should not end in divorce. There are six main reasons to maintain marriage in Catholicism (Lon 2019). First, by maintaining a marriage, he respects the marriage promise as his own commitment that he has spoken before God, his spouse, extended family, and God's people as a whole. In the proclamation of marriage vows there is a commitment to be faithful both in joy and sorrow, in health and in sickness. Loyalty to the marriage vows means having good self-integrity, respecting what has been pledged to oneself is the same as respecting oneself. Commitment in itself is a sign of freedom and maturity, and is a great and courageous decision. Thus, maintaining a marriage is tantamount to asserting the ability to remain mature, faithful to one's own choices. Second, the effort to maintain a marriage means showing appreciation and

appreciation for those who have contributed to the success of their marriage. Marriage is a long process and involves many parties. In the process, there are many parties who have made extraordinary contributions because marriage is not just a personal matter for two people, but also a big family matter for two couples and even a community matter. Many people have contributed to building the relationship between the two couples, among others, there are friends who support, there are parents who bless, there are people who pray, and there are church pastors who bless. Everyone who was present in the courtship relationship and until the marriage took place had contributed to supporting the marriage. So, maintaining a marriage is the same as paying respect to those who made the marriage happen. Third, by maintaining the marriage, a person appreciates the changes that occur between them together. This change is the fruit of the marriage. Living together with people from different backgrounds makes a person grow and develop. Everyone learns to understand each other, learns to accept differences, learns to work together, learns to find solutions to problems, learns to adapt, and learns to behave well in order to be able to make each other happy and survive together. All that makes a person grow and develop into a new person. This is the fruit of marriage.

Fourth, by maintaining his marriage, a person becomes an example figure for those around him. Marriage is part of the dynamics of living together, by surviving in a marriage, a person becomes an example for his children and neighbors. When faithful couples communicate with each other, everyone around believes in married life and wants to follow the example set. Families who survive in marriage can be an example for those who have just started married life. Fifth, marriage is a way to support the ups and downs of life. Humans always experience life like a spinning wheel. There are sad experiences, disappointments, pain, hurt, death, loss, and pain. In marriage, spouse, family is the best place to share grief. Loved ones are the closest friends to accompany all our sorrows. Likewise, life is also experienced as happiness, joy, joy, success, prosperity, and all that is beautiful. Everything is more beautiful when shared and felt together. Family and marriage are places where happiness will be more beautiful experienced in togetherness. Sixth, marriage brings people to many advantages and opportunities. Marriage allows couples to experience parties, build houses and live together, have someone to share with. Only with the person with whom we make a covenant can we feel the freedom to express our feelings of joy and sorrow. Having children, owning a home, planning for the future, seeing children laugh, experiencing growth and feeling joy from family members will only happen in marriage.

Article 2 of Marriage Law stipulates that a marriage is legal if it is performed according to the respective religion of the couple and is registered. Ideally, if a marriage is declared valid if it involves religious elements, then the divorce process should also involve those similar elements. In the case of marital conflict among couples, the conciliation judge can invite community leaders or traditional leaders or religious leaders who have an important role in their social life, who are listened to and respected by both parties, to help resolve the dispute between the married couples.

Article 26 (paragraph 1) of Supreme Court Regulation No 1 of 2016 concerning Mediation Procedure in Court, allow religious leaders to be involved in mediating the marital conflicts between couples who intend to file for divorce. Thus, for such reconciliation, settlement mediation will be the right model because it intends to reach a compromise between the conflicting parties. Settlement mediation is a compromise mediation mainly intended to encourage a compromise between the demands of the two conflicting parties (Korah 2013). Meanwhile, the pastor as a religious figure can focus on the problems faced by both parties by persuading them to adhere to the marriage values in Catholic religious law. He presents a

persuasive stance in order to mitigate the conflict between the married couples and to lead them to a compromise.

The judge's insistence in involving the pastor in the mediation process for Catholic married couples who intend divorce indicates the recognition of marital values in Catholic religious law. The invited pastor can give advices and help solve the problem facing the parties to the conflicts, but not deciding what the parties should do. The advisory process may continue until the parties decided not to get divorced.

A judge who recognizes the values of religious law will provide an opportunity for mediation by involving the church or rejects the application for divorce from a Catholic married couple who has not consulted for the church priest's advices.

4. Conclusion

The provision in the Marriage Law is not devoid of influence of religious law. The latter become even stronger as we can see in Article 2 (paragraph 1) stipulating that a marriage is legal if it performed according to the religion of the two parties. Marriage as a legal event involves sacred elements and thus need to be performed according to religious law.

In cases involving divorce, Article 39 paragraph 1 of Marriage Law states that divorce can only be granted in front of a court session after the court has tried and failed to reconcile the two parties. However, this is contrary to the provisions regarding the legal requirements of a marriage, especially in Article 2 of the Marriage Law which states that a marriage is considered valid if it is performed according to religious law and is registered. The contradiction is that religious elements are involved in the marriage process, while in the divorce process there is no involvement of similar elements, especially for Catholic married couples who file for divorce in the District Court.

The trial process is an important part before the judge makes his decision because he will actively search and find the law to ensure fairness for the parties. Divorce proceedings at court require the role of judges as regulated in Article 39 (paragraph 1) of Marriage Law, stipulating that divorce can only be granted in front of a court session after the court has tried and failed to reconcile the two parties. The conciliation requires a mediator to help resolve disputes between the conflicting parties so as to discourage their intention to divorce.

Article 19 (paragraph 1) of Supreme Court Regulation Number 1 of 2016 concerning the Procedures of in-Court Mediation determines that the parties have the right to choose one or more mediators registered on the mediator list in the court. The involvement of a church priest aims to assist the conflicting parties in finding a way out of their marriage problems. This is further corroborated in Article 26 (paragraph 1) of Supreme Court Regulation Number 1 of 2016 concerning the Procedures of in-Court Mediation that allows the involvement of religious figures to help solve the problem of the married couples who intend to divorce.

The judge can dismiss the application for divorce from a Catholic married couple without any mediation through pastoral consulting or advisory. The involvement of a pastor, as a religious figure, in such mediation is expected help persuade the conflicting parties to adhere to the religious laws in Catholicism in order to discourage them from filing for divorce.

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